Filed 5/17/10 P. v. Ferreria CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. FAUSTO DEVERA FERRERIA, JR., Defendant and Appellant.	C058730 (Super. Ct. No. 03F06454)

Defendant Fausto Devera Ferreria, Jr., was charged with second degree murder (Pen. Code, § 187, subd. (a))[1] and assault on a child, his seven-month-old son, F.F. (hereafter referred to as the minor), with force likely to cause great bodily injury resulting in death, within the meaning of section 273ab. A jury acquitted defendant of the murder charge, but convicted him of the included offense of involuntary manslaughter and of the charge of child assault resulting in death. Defendant was sentenced to a term of 25 years to life for the child offense

---

[1] Hereafter references to undesignated sections are to the Penal Code.

(§ 273ab) and to three years for the manslaughter (§ 192, subd. (b)), with the latter sentence stayed pursuant to section 654.

On appeal, defendant's sole contention is that he was "prejudiced by the court's refusal to give CALCRIM No. 625," relating to the purposes for which the jury may consider his voluntary intoxication. We will direct that a correction be made to the abstract of judgment and affirm the judgment.

FACTS

In February 2003, defendant was living with his girlfriend, Nging Saechao, their two children, a 16-month-old and the seven-month-old minor, as well as Saechao's daughter and son from a previous relationship, and her parents. The minor was born eight weeks prematurely and suffered from apnea, which causes breathing difficulties, and anemia, conditions for which he remained in the hospital for two months. After the minor's release from the hospital, he was placed on an apnea breathing machine, however, Saechao returned the machine to the hospital when she believed the minor no longer needed it. In October 2002, the minor underwent minor surgery to repair a hernia, but after that he was healthy, happy and growing.

On February 20, 2003, about 9:30 a.m. Saechao dressed the minor and left him with defendant, who was cleaning the garage. When she returned, defendant and the minor were playing and laughing. Around 10 or 10:30 a.m., Saechao gave the minor a bottle, put him down in his crib and told defendant to watch him because she was going to Safeway.

On her way to Safeway, Saechao decided she would visit her father who was fishing on the river near Clarksburg. She located her father and visited with him for a short time. When Saechao arrived home, she saw defendant on the on the floor administering CPR to the minor who was "blue." Defendant said he did not know what had happened and Saechao called 911. Emergency personnel responded and transported the minor to the hospital.

At 4:35 p.m. on February 20, 2003, defendant gave an audiotaped interview to investigating officers. Defendant said that after Saechao had left he continued to clean the garage, but after about 15 minutes he went inside to check on the minor and saw that he was doing fine. When he later went inside he saw that the minor was having difficulty breathing and appeared to be choking. Defendant panicked, picked up the minor, shook and patted him, and jumped up and down, all in an effort to aid him. Holding the minor, defendant ran around the house and may have accidentally caused the minor's head to hit a door jamb. He gave the minor CPR, which caused some milk to come out of the baby's mouth. During a second recorded interview, conducted later that evening, defendant said he slapped the minor on the face three or four times trying to dislodge what he had in his mouth. A demonstration of the slapping by the interviewing detective showed use of minimal force.

The investigators interviewed defendant again on February 21, 2003. Defendant denied using any drugs the night before he had found the minor choking. Defendant admitted to having

previously smoked marijuana, the last time occurring about three months before. Defendant also admitted he had smoked methamphetamine but the last time was about two years before.

On February 22, 2003, the minor, who had remained in the hospital, was pronounced dead. On February 24, Dr. Mark Super, an expert on forensic pathology, conducted an autopsy on the minor and concluded that his death was caused by blunt-force trauma to the head. The minor had bruises on both sides of his face, a large fracture of his parietal bone, a subdural hematoma, a subarachnoid hemorrhage, severe retinal hemorrhaging, and brain swelling. The injuries could not have been the result of an apneal event nor by the baby's head having struck a door jamb while being carried.

Dr. Angela Rosas, an expert in evaluating child abuse injuries, concluded that bruises on the minor's chin were consistent with "very forceful pressure" having been applied and were not consistent with giving him CPR. An injury to the minor's ear was caused by a "very forceful slap."

Dr. Stephany Fiore, another forensic pathologist, concluded that injuries to the minor's brain dura and eyeballs resulted in lack of oxygen and blood flow to his brain which caused the brain to die. She also concluded that the injuries were purposefully inflicted.

Kenneth Hazen, who shared a cell with defendant, testified that defendant had told him that defendant had shaken, slapped and choked the minor because the minor was not sleeping.

Defendant said that "he hadn't slept because he had been up on methamphetamine . . . ."

Shannon Masterson testified that she often would hang out with defendant at the home of Jonas Gutierrez where they would smoke methamphetamine. According to Masterson, defendant was using methamphetamine heavily before the minor's death. When using methamphetamine, defendant could become "quite pushy," but not violent.

Defendant did not testify.

DISCUSSION

Defendant requested the court to instruct the jury with a modified version of CALCRIM No. 625, the general instruction regarding the jury's consideration of a defendant's voluntary intoxication on his mental state.[2] The modification defendant sought was to have CALCRIM No. 625 specifically include relating voluntary intoxication to the mental state required for "assault causing death of a child." The court refused because it

---

[2] CALCRIM No. 625 provides: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,] [[or]the defendant was unconscious when (he/she) acted[,]] [or the defendant _____ *<insert other specific intent required in a homicide charge or other charged offense>*.] [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose." (Original italics.)

believed the subject was adequately covered by a modified version of CALRCIM No. 375, which it intended to, and did, give.[3]

Defendant contends the court's refusal was prejudicial error because his requested modification was "a pinpoint instruction relating specifically to the effect of voluntary intoxication on [his] awareness as it relates to the [assault] causing death charge."

---

[3] In relevant part, the court's modified version of CALCRIM No. 375 provided: "The People presented evidence that the defendant committed an offense that was not charged in this case, namely use of methamphetamine during the relevant time period as stated by the court. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the offense. . . . [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant used methamphetamine, you may, but are not required to, consider that evidence for the limited purpose of assessing the defendant's mental state at the time of the alleged offenses and assessing the accuracy and reliability of statements he made about the alleged offenses. The mental states required to find the defendant guilty of the particular offenses relevant to this instruction are set forth in the instructions [CALCRIM No.] 520 (second degree murder), [CALCRIM No.] 580 (involuntary manslaughter), and [CALCRIM No.] 820 (assault causing death of child."

In relevant part, CALCRIM No. 820 provided: "The defendant is charged in Count 2 with killing a child under the age of 8 by assaulting the child with force likely to produce great bodily injury. To prove that the defendant is guilty of this crime, the People must prove that [¶] . . . [¶] 5. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in great bodily injury to the child[.]"

We reject the claim because defendant was not entitled to any instruction, modified or unmodified, relating his voluntary intoxication to his mental state as defined by section 273ab.

"[S]ection 273ab is neither a murder statute nor a felony-murder statute." (*People v. Norman* (2003) 109 Cal.App.4th 221, 227.) "Section 273ab is a general intent crime. The mens rea for the crime is willfully assaulting a child under eight years of age with force that objectively is likely to result in great bodily injury . . . . [¶] . . . [S]ection 273ab is analogous to section 245, subdivision (a)(1), which makes it a felony for any person 'by any means of force likely to produce great bodily injury' to commit an assault upon another. Section 245, subdivision (a)(1), does not require a specific intent to produce great bodily injury. [Citation.] It is a general intent crime. [Citation.]"[4] (*People v. Albritton* (1998) 67 Cal.App.4th 647, 658.) "Evidence of voluntary intoxication . . . is 'admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.' (§ 22, subd. (b) . . . .)" (*People v. Roldan* (2005) 35 Cal.4th 646, 715, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

---

[4] On May 10, 2010, the California Supreme Court filed its decision in *People v. Wyatt* (May 10, 2010, S161545) ___ Cal.4th ___ [pp. 4-5]) affirming that section 273ab is a general intent crime.

Consequently, defendant was not entitled to any instruction on voluntary intoxication as it related to his mental state in the charge of violation of section 273ab. Not being entitled to any such instruction, defendant will not be heard to complain of a deficiency in the instruction which, as given, actually benefitted him.

Finally, pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we have deemed defendant to have raised an issue (without additional briefing) of whether amendments to section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence conduct credits. In our recent opinion of *People v. Brown* (2010) 182 Cal.App.4th 1354, ___ [p. 24], we concluded that the amendments apply to pending appeals. However, as defendant was convicted of a felony in which the defendant personally inflicted great bodily injury, a serious felony as provided for in section 1192.7, subdivision (c)(8), the recent amendments to section 4019 do not operate to modify his entitlement to credit. (§§ 2933.1, subd. (a), 4019, subds. (b)(1), (2) and (c)(1), (2); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.)

There is an error on the abstract of judgment that must be corrected. Box number 5 is checked on the abstract, indicating defendant was sentenced to life with the possibility of parole on count two. Defendant was sentenced to a term of 25 years to life with the possibility of parole on count two. Box number 6

should be checked on the abstract of judgment to reflect the correct term.

DISPOSITION

The judgment is affirmed. The superior court is directed to correct the abstract of judgment to reflect that defendant's term is 25 years to life with the possibility of parole on count two and to forward the corrected abstract to the Department of Corrections and Rehabilitation.

NICHOLSON, J.

We concur:

BLEASE, Acting P.J.

CANTIL-SAKAUYE, J.